

No. PD-0936-20

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS  
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**JEREL CHINEDU IGBOJI, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

Appeal from Fort Bend County

\* \* \* \* \*

**STATE'S BRIEF ON THE MERITS**

\* \* \* \* \*

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ORAL ARGUMENT REQUESTED

## **NAMES OF ALL PARTIES TO THE TRIAL COURT’S JUDGMENT**

\*The parties to the trial court’s judgment are the State of Texas and Appellant, Jerel Chinedu Igboji.

\*The case was tried before the Honorable Chad Bridges, Presiding Judge, 240<sup>th</sup> District Court, Fort Bend County, Texas.

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**JEREL CHINEDU IGBOJI, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

\* \* \* \* \*

**STATE'S BRIEF ON THE MERITS**

\* \* \* \* \*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

When an officer faced with new information about the loss of evidence intrudes on individual liberty only to the extent necessary to obtain a warrant, he has done all the Fourth Amendment can ask of him.

**STATEMENT OF THE CASE**

Appellant was convicted of aggravated robbery based largely on text messages obtained from his cellular phone showing he was the inside man. The court of appeals reversed his conviction, and held that the officer could not have had exigent circumstances to seize the phone without a warrant because 1) he waited until three days after the robbery, and 2) appellant was not in the act of deleting at the time.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Court granted oral argument. The State will appear.

### **ISSUES PRESENTED**

- 1. Do exigent circumstances to seize a cellular phone for fear of unintentional loss of evidence require that law enforcement act at the earliest possible opportunity?**
- 2. Do exigent circumstances to seize a cellular phone for fear of intentional destruction of evidence require “affirmative conduct” by the suspect?**
- 3. Does the exigent circumstances exception require proof that the evidence was unavailable from other sources?**

### **STATEMENT OF FACTS**<sup>1</sup>

On December 10, two armed men robbed the Kentucky Fried Chicken (KFC) restaurant at which appellant worked.<sup>2</sup> The men forced appellant and two other employees into the freezer while they took what money they could.<sup>3</sup> Police began their investigation that night.<sup>4</sup>

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<sup>1</sup> The hearing on appellant’s motion was held after the jury was empaneled and sworn. 2 RR 163 (jury sworn); 3 RR 6-66 (hearing). No findings of fact were requested.

<sup>2</sup> 3 RR 23-24; 6 RR 60 (Court’s Ex. 1 (Affidavit for Search Warrant), which was admitted at the suppression hearing (3 RR 49)).

<sup>3</sup> 3 RR 125.

<sup>4</sup> 6 RR 60.

The following morning, Detective Ramirez went to KFC and spoke to some of the employees.<sup>5</sup> Everyone he spoke to was suspicious of appellant or thought appellant acted strangely that night.<sup>6</sup> They focused on him volunteering to take the garbage out; appellant's manager said he was generally lazy and never wanted to work.<sup>7</sup> That act allowed the robbers to enter, which is why it is against policy to leave the door unsecured.<sup>8</sup> Appellant said his manager told him to, which she denied.<sup>9</sup>

Ramirez also learned from another employee about a Snapchat video or videos that showed the investigation the night before.<sup>10</sup> That employee did not want to save the video(s) to her phone because it would alert appellant.<sup>11</sup> She was able, however, to provide enough information to allow Ramirez to verify the video(s) came from an account belonging to appellant.<sup>12</sup>

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<sup>5</sup> 3 RR 23-24.

<sup>6</sup> 3 RR 41-42, 46, 48.

<sup>7</sup> 3 RR 46; 6 RR 60.

<sup>8</sup> 3 RR 46; 6 RR 60.

<sup>9</sup> 6 RR 60.

<sup>10</sup> 3 RR 24, 26, 154; 6 RR 60.

<sup>11</sup> 3 RR 28-33.

<sup>12</sup> 3 RR 24, 29.

Three days later, on December 14, Ramirez called appellant and asked if he would come speak with him.<sup>13</sup> Appellant was agreeable but did not have a car, so Ramirez picked him up.<sup>14</sup> Ramirez did not arrest appellant, Mirandize him, or otherwise treat the conversation at the station as though it was anything but consensual.<sup>15</sup> To this point, appellant had been cooperative and so Ramirez treated him like a victim and witness.<sup>16</sup> As far as he was concerned, the only evidence he had was that appellant would not have normally volunteered to take the garbage out because he is lazy.<sup>17</sup> As Ramirez put it, “Being lazy isn’t a crime.”<sup>18</sup> Moreover, Ramirez was interested only in obtaining a full copy of the video(s) appellant took; he did not want the phone.<sup>19</sup> He believed appellant would share.<sup>20</sup>

Ramirez’s view towards appellant’s role in the robbery changed through the course of the conversation. Whereas appellant had been cooperative, he now

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<sup>13</sup> 3 RR 27. All the phone calls, messages, and in-person communication Ramirez made during the investigation were apparently intended to be part of the record as Court’s Exhibit 2, which was marked at the suppression hearing but not admitted until after the jury began deliberations on guilt. 4 RR 123. The initial call is file 151214\_001.

<sup>14</sup> 6 RR 61; Court’s Ex. 2 (recording of car ride, 151214\_003).

<sup>15</sup> 3 RR 42.

<sup>16</sup> 3 RR 36, 42.

<sup>17</sup> 3 RR 42.

<sup>18</sup> 3 RR 42.

<sup>19</sup> 3 RR 30, 35.

<sup>20</sup> 3 RR 36, 44, 47.

(politely) refused to allow Ramirez to download the video(s) despite maintaining his innocence.<sup>21</sup> This change in attitude “kind of” surprised Ramirez.<sup>22</sup> Appellant told Ramirez that the video(s) were deleted by Snapchat after 24 hours.<sup>23</sup> Ramirez believed Snapchat deleted videos after a certain amount of time, but he believed the user could predetermine that time or retain them using the app.<sup>24</sup> He also believed that a video did not have to be recorded using the Snapchat app to be sent via it.<sup>25</sup> In other words, it might exist on appellant’s phone even if the sent copy had been deleted by Snapchat.<sup>26</sup> And even if it had been or was being deleted, Ramirez knew there were ways to recover data.<sup>27</sup> Once it became clear appellant was no longer cooperative, Ramirez became concerned evidence would be lost or deleted if he did not seize the phone and obtain a warrant.<sup>28</sup> So that is what he did.<sup>29</sup>

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<sup>21</sup> 3 RR 30, 38; 6 RR 61.

<sup>22</sup> 3 RR 37.

<sup>23</sup> 3 RR 39; 6 RR 61; Court’s Ex. 2 (151214\_004 at 7:38).

<sup>24</sup> 3 RR 25-26, 31. The overall accuracy of his understanding of the technology involved was confirmed by Bruce Motes, a certified forensic examiner who testified at the hearing. 3 RR 50-61.

<sup>25</sup> 3 RR 33.

<sup>26</sup> 3 RR 33.

<sup>27</sup> 6 RR 62.

<sup>28</sup> 3 RR 30, 39, 40, 47.

<sup>29</sup> 3 RR 35; 6 RR 64-65 (signed warrant).

## **SUMMARY OF THE ARGUMENT**

Detective Ramirez treated appellant as a cooperating witness until it was time to not treat him like a cooperating witness. It was not until a consensual meeting, days after the investigation began, that Ramirez realized any evidence on appellant's cell phone would be deleted before it could be preserved. So he seized the phone and obtained a warrant. This is precisely what the Supreme Court said to do in cases culminating in *Riley v. California*. The court of appeals effectively resurrected the "police-created exigency" exception to the exigent-circumstances warrant exception when it held that, as a matter of law, police cannot rely on exigency if a seizure could have been made days earlier. Moreover, it does not matter that different officers might have made different choices. What Ramirez did was reasonable, and that is all the Fourth Amendment requires. A contrary outcome would not only hamstring law enforcement but encourage intrusion into individual liberty.

## **ARGUMENT**

- I. Sometimes there is no time to get a warrant.
- I.A. The reasonable belief that destruction of evidence is ongoing or imminent can excuse warrantless searches.

The Fourth Amendment prohibits "unreasonable searches and seizures" and sets out the constitutional requirements for a warrant.<sup>30</sup> "Although the text of the

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<sup>30</sup> U.S. CONST. amend. IV.

Fourth Amendment does not specify when a search warrant must be obtained,”<sup>31</sup> the Supreme Court often says that a warrantless search or seizure is unreasonable *per se*.<sup>32</sup> “Nevertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.”<sup>33</sup> “Exigent circumstances,” such as “the need ‘to prevent the imminent destruction of evidence,’” is one of those exceptions.<sup>34</sup> This exception can permit intrusions even into a home, “first among equals” under the Fourth Amendment.<sup>35</sup> Although it usually arises in a “now or never” situation, it can be sufficient that the delay required to obtain a warrant will at least serve to diminish the probative value of the evidence sought.<sup>36</sup> As with most Fourth Amendment cases, courts look to the totality of the circumstances.<sup>37</sup>

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<sup>31</sup> *Kentucky v. King*, 563 U.S. 452, 459 (2011).

<sup>32</sup> *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967). The “*per se*” warrant requirement is not without its critics. By 1991 it had, in Justice Scalia’s view, “become so riddled with exceptions that it was basically unrecognizable.” *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). This Court called the requirement a “jurisprudential mare’s nest” with so many exceptions it “not only makes a mockery of the supposed requirement, it interferes with a more fine-tuned assessment of the competing interests at stake.” *Hulit v. State*, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998).

<sup>33</sup> *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

<sup>34</sup> *King*, 563 U.S. at 460 (quoting *Brigham City*, 547 U.S. at 403).

<sup>35</sup> *Florida v. Jardines*, 569 U.S. 1, 6 (2013). *See generally King* and cases cited therein. 563 U.S. at 460, 460 n.3.

<sup>36</sup> *Missouri v. McNeely*, 569 U.S. 141, 152 (2013).

<sup>37</sup> *Id.* at 149.

I.B. Policy considerations favor the lesser intrusion of seizure.

A corollary to a warrantless search of a place or thing based on exigent circumstances is its temporary seizure to obtain a warrant. The Supreme Court explained the rationale in *Illinois v. McArthur*.<sup>38</sup>

In *McArthur*, officers were already present at a home to keep the peace as McArthur's wife collected some belongings.<sup>39</sup> When she emerged, she told an officer that McArthur "had dope in there" that he slid underneath the couch.<sup>40</sup> When McArthur denied consent to search, he was told he could not reenter the home unaccompanied.<sup>41</sup> Another officer obtained a warrant, and a search revealed marijuana and paraphernalia where McArthur's wife said it would be.<sup>42</sup>

In upholding McArthur's exclusion from his home, the court analyzed it as "a plausible claim of specially pressing or urgent law enforcement need, *i.e.*, 'exigent circumstances.'" <sup>43</sup> Because "the restraint at issue was tailored to that need," the court employed a balancing of privacy and law-enforcement interests rather than a

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<sup>38</sup> 531 U.S. 326 (2001).

<sup>39</sup> *Id.* at 328-29.

<sup>40</sup> *Id.* at 329.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 331.

rebuttable *per se* rule.<sup>44</sup> It found four circumstances noteworthy. First, there was probable cause.<sup>45</sup> Second, “the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant.”<sup>46</sup> Knowing what McArthur knew, “[t]hey reasonably could have concluded that McArthur, consequently suspecting an imminent search, would, if given the chance, get rid of the drugs fast.”<sup>47</sup> Third, the officers “imposed a significantly less restrictive restraint” than search of the home or arrest until a neutral magistrate issued a warrant.<sup>48</sup> Fourth, it was limited in duration.<sup>49</sup> Having reviewed its cases, the court could “f[i]nd no case in which [it] has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time.”<sup>50</sup>

The court thus sanctioned limited intrusion on property rights based on the expectation that evidence could be destroyed by a defendant if given the chance.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 331-32.

<sup>46</sup> *Id.* at 332.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* See also *id.* at 336 (“Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search.”).

<sup>49</sup> *Id.* at 332.

<sup>50</sup> *Id.* at 334.

I.C. The Supreme Court applied this to cell phones in *Riley v. California*.

Not only is this practice well-established, it has been framed for application to cell phones. In *Riley v. California*, the Supreme Court explained why the “search incident to arrest” warrant exception does not apply to searching cell phones.<sup>51</sup> One reason is that the exception’s underlying rationales—officer safety and preventing the destruction of evidence—are categorically inapplicable.<sup>52</sup> Specifically, both dangers can be avoided in most cases by seizing the phone. As it pertains to loss of evidence, the court gave officers great latitude.

It began by accepting the concession by both defendants in that case “that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant[,]” calling it “sensible.”<sup>53</sup> “[O]nce law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.”<sup>54</sup>

But the court went further. Even after discounting both 1) the possibility of encryption programs and remote data wiping by third parties, and 2) the relevance of third-party conduct to an analysis that is historically based on the actions of the

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<sup>51</sup> 573 U.S. 373, 401 (2014).

<sup>52</sup> *Id.* at 387-91.

<sup>53</sup> *Id.* at 388.

<sup>54</sup> *Id.*

arrestee,<sup>55</sup> the court was willing to grant officers further powers to secure that data. As to remote wiping, officers are permitted to manipulate the phone to turn it off or remove its battery.<sup>56</sup> “Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone’s automatic-lock feature in order to prevent the phone from locking and encrypting data.”<sup>57</sup> The court said such a measure was comparable to securing the scene of an investigation while awaiting a warrant, and said it “could be analyzed under the principles set forth in . . . *McArthur*[.]”<sup>58</sup>

Although *Riley* was a search case rather than a simple seizure case, the rest of its analysis is informative. An equally important reason to exempt cell phones from the “search incident to arrest” exception is that “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person.”<sup>59</sup> “With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”<sup>60</sup> *Riley* thus makes it clear that seizing a phone to secure its contents while obtaining a warrant is not only an option for officers, it is the constitutionally preferred option.

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<sup>55</sup> *Id.* at 388-90.

<sup>56</sup> *Id.* at 390.

<sup>57</sup> *Id.* at 391.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 393.

<sup>60</sup> *Id.* at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

II. The Supreme Court respects the difficult choices that confront law enforcement.

II.A. The Supreme Court has rejected the so-called “police-created exception” to exigency.

Over the years, courts have attempted to limit the availability of the exigency exception when, in their estimations, police should have made different choices. Whether this comes in the form of “foreseeability” tests or comparison to “standard or good law enforcement practices” of the jurisdiction, the Supreme Court rejected every form of “police-created exigency” in *Kentucky v. King*.

*King* involved the warrantless entry into an apartment in pursuit of a drug suspect following a police “knock-and-announce.”<sup>61</sup> It turned out to be the wrong apartment, but police entered because of noises coming from inside that led them to believe drug-related evidence was being destroyed.<sup>62</sup> The Supreme Court of Kentucky assumed there were exigent circumstances but held that, even in the absence of bad faith, police may not rely on exigent circumstances if “it was reasonably foreseeable that the investigative tactics employed by the police [, *i.e.*, the knock-and-announce,] would create the exigent circumstances.”<sup>63</sup> In other words,

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<sup>61</sup> *King*, 563 U.S. at 455-57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 458 (quotation omitted).

it adopted the “police-created exigency” exception to exigent circumstances.<sup>64</sup> The Supreme Court thoroughly rejected this on both a fundamental and practical level.

II.A.1. Second-guessing police strategy runs contrary to the Fourth Amendment.

Scrutinizing the strategic choices made by police is inconsistent with the Fourth Amendment generally. Because the touchstone of the Fourth Amendment is reasonableness, “the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.”<sup>65</sup> If officers do not create the exigency through violation of the Fourth Amendment, acting to prevent the destruction of evidence is as reasonable as if they had nothing to do with the exigency.<sup>66</sup> This plays out two ways.

First, the court refuses to create a Fourth Amendment violation where no Fourth Amendment interest would be served. It had rejected a “happenstance” limitation on the plain-view doctrine for items officers knew or hoped would be found because there is no additional intrusion on privacy attendant to the seizure of contraband in plain view.<sup>67</sup> It came to the same conclusion with consensual

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<sup>64</sup> *Id.* at 461.

<sup>65</sup> *Id.* at 462.

<sup>66</sup> *Id.*

<sup>67</sup> *Horton v. California*, 496 U.S. 128, 137-38, 141 (1990). The plain-view warrant exception applies when an officer is lawfully where the evidence can be plainly viewed, its incriminating character is “immediately apparent,” and the officer has a lawful right of access to the object itself.  
(continued...)

encounters: “If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.”<sup>68</sup> Ignoring the officer’s hopes or desires dovetails with the court’s refusal to consider an officer’s subjective motivation, which *King* said would be “fundamentally inconsistent with our Fourth Amendment jurisprudence.”<sup>69</sup>

Second, it does not matter that the officer had probable cause and time to get a warrant before the exigency arose.<sup>70</sup> The court reiterated in *King* that “[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.”<sup>71</sup> That is, “[t]here is no constitutional right to be arrested” at the earliest opportunity so that actual constitutional rights attach before further communication with police.<sup>72</sup> For the same reason, “[f]aulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a

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<sup>67</sup>(...continued)  
*Id.* at 136-37.

<sup>68</sup> *King*, 563 U.S. at 463.

<sup>69</sup> *Id.* at 464.

<sup>70</sup> *Id.* at 466.

<sup>71</sup> *Id.* at 467 (quoting *Hoffa v. United States*, 385 U.S. 293, 310 (1966)).

<sup>72</sup> *Hoffa*, 385 U.S. at 310.

duty that is nowhere to be found in the Constitution.”<sup>73</sup> In short, there is no Constitutional right to be arrested, seized, or searched at the earliest point at which the State can plausibly defend its intrusion.

## II.A.2. Second-guessing police strategy is impracticable.

Imposing a “police-created exigency” exception also creates insurmountable practical problems. Not only would a “reasonable foreseeability” test parallel the rejected “happenstance” limitation on plain-view,<sup>74</sup> it would be difficult to implement, especially for officers “often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving.”<sup>75</sup> The same is true for a “contrary to standard or good law enforcement practices” test.<sup>76</sup> Importantly, the court recognized the flexibility of police strategy in a given case. It spent considerable time on the interplay between exigency and consent, and concluded that criticizing the decision to seek consent rather than a warrant “unjustifiably interferes with legitimate law enforcement strategies.”<sup>77</sup> It noted just a few of the “many entirely proper reasons why police may not want to seek a search warrant as soon as

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<sup>73</sup> *King*, 563 U.S. at 467.

<sup>74</sup> *Id.* at 465.

<sup>75</sup> *Id.* at 465-66 (quotation and citation omitted).

<sup>76</sup> *Id.* at 467-68.

<sup>77</sup> *Id.* at 466.

the bare minimum of evidence needed to establish probable cause is acquired”:

- “a short and simple conversation” may reveal that seeking and executing a warrant is unnecessary;
- obtaining consent “is simpler, faster, and less burdensome than applying for a warrant”;
- a consensual search may result in less inconvenience and embarrassment to the citizen;
- officers may want more evidence than the bare minimum required;
- prosecutors may want more evidence to justify a broader search;
- obtaining a warrant that must be executed promptly would reveal the existence of an investigation law enforcement might prefer remain secret.<sup>78</sup>

As that court said in *Hoffa*, “The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, [thereby] risking a violation of the Fourth Amendment if they act too soon[.]”<sup>79</sup>

As decades of case law have shown, a framework that ties exigency to the precise moment that probable cause is achieved is unsupported by the Constitution and would be unworkable in practice.

II.B. Respect for law enforcement undergirds the exclusionary remedy itself.

Comparison of the above policy discussion to the rationale underlying the exclusionary remedy shows a similarity that should not be ignored. Exclusion of illegally obtained evidence is not an individual right, nor is it “an automatic

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<sup>78</sup> *Id.* at 466-47.

<sup>79</sup> *Hoffa*, 385 U.S. at 310.

consequence of a Fourth Amendment violation.”<sup>80</sup> “The Fourth Amendment exclusionary rule exclusively serves a function of deterrence, to discourage undue police encroachment upon the privacy and personal integrity of the citizenry.”<sup>81</sup> It entails a “rigorous weighing of its costs and deterrence benefits” calibrated to focus on the flagrancy of the police misconduct at issue.<sup>82</sup>

The extent to which exclusion is justified varies directly with the culpability of the law enforcement conduct.<sup>83</sup> “[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>84</sup> Conversely, “[w]hen the police act with an objectively ‘reasonable good-faith belief’ that their conduct is lawful, or when their conduct involves only simple, ‘isolated’ negligence, the ‘deterrence rationale loses much of its force’ and exclusion cannot ‘pay its way.’”<sup>85</sup> The Supreme Court has framed this as a type of attenuation. “Attenuation can occur, of course, when the causal connection is remote.

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<sup>80</sup> *Herring v. United States*, 555 U.S. 135, 137, 141 (2009).

<sup>81</sup> *State v. Mazuca*, 375 S.W.3d 294, 300 (Tex. Crim. App. 2012).

<sup>82</sup> *Davis v. United States*, 564 U.S. 229, 238 (2011).

<sup>83</sup> *Herring*, 555 U.S. at 143.

<sup>84</sup> *Id.* at 144. *See also id.* at 143 (“evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’”) (quotations and citations omitted).

<sup>85</sup> *Davis*, 564 U.S. at 238 (quotations and citations omitted).

Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”<sup>86</sup>

Balanced against this deterrent effect is the cost of exclusion, principally “letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system.”<sup>87</sup> This cost is “substantial.”<sup>88</sup> “[S]ociety must swallow this bitter pill when necessary,”<sup>89</sup> but the remedy should be a court’s “last resort” rather than its “first impulse.”<sup>90</sup>

In both exigency and exclusion, then, the central question is the same: is second-guessing the officer’s decision worth letting the guilty go free?

### III. Application

III.A. This should have been a straightforward application of established law.

When the facts, largely accepted by the court of appeals, are viewed collectively, this looks like a simple case:

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<sup>86</sup> *Hudson v. Michigan*, 547 U.S. 586, 593 (2006).

<sup>87</sup> *Herring*, 555 U.S. at 141 (quotation and citation omitted).

<sup>88</sup> *Hudson*, 547 U.S. at 591.

<sup>89</sup> *Davis*, 564 U.S. at 237.

<sup>90</sup> *Hudson*, 547 U.S. at 591.

- Detective Ramirez had probable cause to believe appellant's phone was used to record evidence related to a crime.<sup>91</sup>
- Ramirez's belief about how Snapchat works—including his belief that it could be set not to immediately delete data—was reasonable.<sup>92</sup>
- Ramirez's belief that the video could have been recorded independently of Snapchat and saved on the phone was reasonable.
- Appellant had been cooperative with law enforcement and Ramirez treated him as a witness rather than a suspect.<sup>93</sup>
- Ramirez did not seize the phone until appellant stopped cooperating.<sup>94</sup>
- At the time he seized appellant's cellular phone, Ramirez believed the phone contained evidence that was either being deleted by Snapchat or could be deleted by appellant.<sup>95</sup>

In short, Ramirez had reason to believe that evidence was presently on the phone, reason to believe it was presently disappearing, and reason to believe appellant would delete what he could if given the chance. Ramirez did what any reasonable officer would do in those circumstances—he acted to preserve evidence. Moreover, his intrusion into appellant's rights stopped at seizure; no warrantless search was conducted. He did no more than what *McArthur* and *Riley* permit.

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<sup>91</sup> The court of appeals's holding that Ramirez should not have waited three days to seize the phone depends on that fact. *Igboji v. State*, 607 S.W.3d 157, 167 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).

<sup>92</sup> *Id.* at 170.

<sup>93</sup> *Id.* at 163.

<sup>94</sup> *Id.* at 166.

<sup>95</sup> *Id.* at 163 (summary of facts), 169-70 (analysis).

### III.B. The court of appeals made things complicated.

Instead of applying the Supreme Court’s jurisprudence directly on point, the court of appeals divided exigency law into two types: “dissipation” and “affirmative conduct.” This, despite the Supreme Court having said in the context of searches incident to arrest, “the distinction . . . between an arrestee’s active destruction of evidence and the loss of evidence due to a natural process makes little sense.”<sup>96</sup> Having divided what should have been a single totality-of-the-circumstances test, it conquered through misapplication of the law.

#### III.B.1. The court of appeals’s “dissipation” analysis imposed arbitrary limitations on exigency.

Its analysis of “dissipation” says, in full:

Here, the record is devoid of any evidence presented to the trial court or on appeal showing the specific details of the Snapchat application with respect to automatic deletions of relevant data from either Snapchat’s records or from Appellant’s phone; therefore, no fact sufficiently (or even arguably) supported Officer Ramirez’s supposedly reasonable belief in “the existence of an exigency”, particularly in light of the fact that he seized Appellant’s phone three days after the alleged crime. We are aware of no cases in which a three-day delay evidences exigency, particularly where there is no showing that the information at issue cannot be recovered from an alternative source.<sup>97</sup>

In two sentences, the court 1) focused on Ramirez’s legal reasoning instead of his

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<sup>96</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2182 (2016).

<sup>97</sup> *Igboji*, 607 S.W.3d at 167 (citations omitted). The seizure was three days after Ramirez became aware of the video(s), but four days after the offense.

factual beliefs, which it had deemed reasonable, 2) created a rule by which delay automatically nullifies exigency, and 3) added a requirement of unavailability from other sources. Each aspect of the analysis is wrong.

III.B.1.a. An officer's legal conclusions are immaterial.

From the phrasing of the analysis and its citation to this Court's decision in *State v. Garcia*,<sup>98</sup> it appears that the court of appeals conflated review of the facts Ramirez believed (as implicitly found by the trial court) with Ramirez's belief there was an exigency. The court of appeals did not explain its citation to *Garcia*, but the page it cited explained that the officer's legal conclusions are irrelevant; what matters is what the facts known to him objectively support.<sup>99</sup> In context, it appears the court of appeals took this to mean that it could ignore Ramirez's belief that he had an exigency if the facts showed otherwise. This is true. But, as explained above, that court could not ignore the implicit findings that were supported by the record and that *it* deemed reasonable: Ramirez thought the images were being deleted or would be deleted imminently. Those are the facts that justified the seizure, not Ramirez's belief that they did.

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<sup>98</sup> *Id.* (citing *State v. Garcia*, 569 S.W.3d 142, 151 (Tex. Crim. App. 2018), reh'g denied (Mar. 6, 2019)).

<sup>99</sup> *Garcia*, 569 S.W.3d at 151.

The upshot of *Garcia* was that this Court respected the trial court’s discretion to view the evidence differently than this Court might have.<sup>100</sup> This court of appeals should have done the same.

III.B.1.b. No technical evidence is required.

To the extent the court of appeals discounted Ramirez’s belief about the technology because there was no evidence of the technical specifications of appellant’s phone or version of Snapchat installed thereon, that has been rejected two ways. First, Ramirez could have been mistaken so long as his mistake was reasonable.<sup>101</sup> Second, trial courts may rely on an officer’s statement of expertise when deciding whether his application of same to the circumstances of a given case is reliable.<sup>102</sup> Having agreed that Ramirez’s belief was reasonable, the court of appeals should have ended its inquiry.

III.B.1.c. The “delay” rule is just a novel take on “police-created exigency.”

To the extent the court of appeals based its holding on the three-day delay rather than Ramirez’s ignorance of the technical specifications of the phone and app, it effectively re-imagined the “police-created exigency” doctrine rejected in *Kentucky*

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<sup>100</sup> *Id.* at 157.

<sup>101</sup> *Robinson v. State*, 377 S.W.3d 712, 720 (Tex. Crim. App. 2012).

<sup>102</sup> *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 37 (Tex. Crim. App. 2017).

*v. King*. The argument is apparently that waiting three days when you suspect time could be of the essence should take exigency off the table. If those were the only facts, it might be persuasive. But, as explained above, relying on a suspect's consent is reasonable, and appellant's unexpected lack of cooperation was a change in circumstance that triggered Ramirez's concern for loss of evidence.

III.B.1.d. Not one of the cases cited by the court of appeals supports its holding.

The court of appeals cited *Steagald v. United States*<sup>103</sup> for the proposition that “no exigency [exists] when officers knew the address of the house to be searched two days in advance.” That was not the holding, or even *a* holding, of *Steagald*. As the Supreme Court said, the question before it was “a narrow one”: whether to extend the holding of *Payton v. New York* and permit police to use an arrest warrant to enter the home of a third party to seize the would-be arrestee.<sup>104</sup> When the court decided *Payton*, it explicitly said the issue of exigency was not presented and assumed there were none.<sup>105</sup> *Steagald* did not revisit it. The portion of *Steagald* cited by the court of appeals dealt with alleged practical problems with requiring police to obtain a warrant before entering a third party's house. The Supreme Court explained that,

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<sup>103</sup> *Steagald v. United States*, 451 U.S. 204 (1981).

<sup>104</sup> *Id.* at 211-12. *See Payton v. New York*, 445 U.S. 573, 603 (1980).

<sup>105</sup> *Payton*, 445 U.S. at 582-83.

because police could 1) rely on exigency for a true “hot pursuit” situation, 2) use an arrest warrant to enter the suspect’s house under *Payton*, or 3) arrest him anywhere in public, there was no great inconvenience presented by having to obtain a warrant in the intervening two days between receiving the tip and entering the house.<sup>106</sup> That latter statement is true, but irrelevant here. The police in *Steagald* were faced with a static set of circumstances that made a delayed warrantless entry unreasonable. Ramirez faced a sudden change in circumstances that created an exigency moments before seizing appellant’s phone. That was reasonable.

The court of appeals also cited two cases that deal with the fire-investigation warrant exception, *Michigan v. Tyler*<sup>107</sup> and *Tata v. State*.<sup>108</sup> As explained in *Tyler*, a warrant exception based on extinguishing the flames and promptly investigating the cause in order to detect “continuing dangers such as faulty wiring or a defective furnace” should be limited to “a reasonable time to investigate the cause of a blaze after it has been extinguished.”<sup>109</sup> In that context, basing the exception on the time between the fire and the Fourth Amendment event makes sense. Arbitrarily tethering the analysis of a more general exigency case to the date of the offense does not.

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<sup>106</sup> *Steagald*, 451 U.S. at 221-22.

<sup>107</sup> 436 U.S. 499 (1978).

<sup>108</sup> 446 S.W.3d 456 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d).

<sup>109</sup> *Tyler*, 436 U.S. at 510.

The court of appeals also cited *G.M. Leasing Corp. v. United States*, in which revenue agents entered an office without a warrant two days after finding out the car they intended to seize was missing and boxes of paperwork were moved.<sup>110</sup> The Supreme Court said, “The agents’ own actions, however, in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, are sufficient to support the District Court’s implicit finding that there were no exigent circumstances in this case.”<sup>111</sup> That quotation is the entirety of the Supreme Court’s analysis of exigency, which the government proffered as its final, alternative argument that tax agents can go where they want when they want to take what they want pursuant to valid assessments and levies.<sup>112</sup> Under those circumstances, the time to seize physical items you know are disappearing is when you find out they are disappearing. And the measured response would have been to lock the office down until a warrant could be obtained. Nothing about *G.M. Leasing* controls this case, in which new concern about imminent deletion prompted an immediate, limited intrusion into property rights to obtain a warrant.

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<sup>110</sup> 429 U.S. 338, 346 (1977).

<sup>111</sup> *Id.* at 358-59.

<sup>112</sup> *Id.* at 354-58.

Finally, the court of appeals cited *Leslie v. Ingram*, a review of a federal suit for civil damages against three police officers.<sup>113</sup> The facts of that case put its value in doubt. According to Charles Leslie (his brother Carlton was also a plaintiff), whose testimony was accepted as true because he lost on summary judgment below, he was lawfully and peacefully parked in his father's yard when Ingram, in plain clothes, exited an unmarked car and "accosted him, grabbed him and struck him with a flashlight without identifying himself as a police officer, or announcing the fact, authority, or reason for the arrest."<sup>114</sup> Charles fled to the house, where he was "arrested" as he was entering.<sup>115</sup> Police impounded his car.<sup>116</sup> Charles was apparently seized a second time under a warrant of dubious validity.<sup>117</sup> The Eleventh Circuit said Charles's initial arrest could not be justified by exigent circumstances because, under Florida law, Charles did not know he was being arrested and so could not have been in flight as he ran inside.<sup>118</sup> The court of appeals in this case quoted this sentence: "Moreover, the officer's own testimony belies their claim of exigency in that they did

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<sup>113</sup> 786 F.2d 1533 (11th Cir. 1986).

<sup>114</sup> *Id.* at 1535.

<sup>115</sup> *Id.* at 1536.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1535.

<sup>118</sup> *Id.* at 1536.

not secure the area and waited two days to procure a warrant.”<sup>119</sup> Neither court offered further explanation. It is thus unclear why failing to secure the area following the warrantless arrest militates against exigency. If the point was that police could have surrounded the house to prevent Charles from leaving while a warrant was procured, that is the functional equivalent of what happened in this case.

Again, the court of appeals’s fixation on the number of days between the offense and the phone’s seizure ignores how investigations unfold and circumstances change. There is good reason such a bright-line rule has no case law to support it.

### III.B.2. There is no “affirmative conduct” requirement.

The court of appeals rejected reliance on any other form of exigency because appellant was not engaged in “affirmative conduct” at the time of the seizure. That is, appellant was not actively in the process of physically deleting files. As shown above, *McArthur* authorizes officers to interfere with property rights to prevent anticipated destruction of evidence, and *Riley* makes that test applicable to cell phones—both without any evidence the suspect was destroying evidence. The court of appeals, however, relied on this Court’s opinion in *Turrubiate v. State*.<sup>120</sup> It did so in error.

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<sup>119</sup> *Id.*

<sup>120</sup> 399 S.W.3d 147, 149 (Tex. Crim. App. 2013).

Turrubiate involved the warrantless entry and search of a home based on the smell of marijuana.<sup>121</sup> *Kentucky v. King* required this Court to re-examine its test for warrantless entry based on the destruction of evidence.<sup>122</sup> This Court distinguished the facts before it from the facts of *King*, which it said “require[] that the record show proof of imminent destruction based on affirmative conduct by those in possession of narcotics in a particular case.”<sup>123</sup> It is in this narrow context that the “affirmative conduct” requirement arose. All *Turrubiate* did was reiterate that warrantless *entry* into a home to search must be based on evidence that the destruction of evidence was imminent. It concluded that this could be proven only by evidence of activity suggesting destruction, which it deemed lacking in that case. Assuming those statements are correct, *Turrubiate* does not dictate (or even influence) what happens in a cell phone seizure case.

Forcibly entering a house to search without a warrant is not the same thing as excluding the owner therefrom while a warrant is diligently pursued. The latter is plainly permitted by *McArthur*. As this Court has held, forcible entry to search is not even the same thing as escorting an owner into his house to make sure that he will not

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 151-53 (reviewing *McNairy v. State*, 835 S.W.2d 101 (Tex. Crim. App. 1991)).

<sup>123</sup> *Id.* at 152-53.

destroy evidence he claims he is retrieving.<sup>124</sup> This case is even farther removed. It involves only the temporary seizure of a cell phone so that a warrant could be procured before searching its contents. If “affirmative conduct” is not required to keep a man from his home, it should not be required to keep a man from his phone.

### III.B.3. There is no “alternative sources” inquiry.

Finally, the court of appeals made the point of saying, almost as an afterthought, that the State failed to prove that Ramirez could have obtained the video(s) from another source. There is no support for requiring the State to prove this negative. The court’s “*Cf.*” to *Michigan v. Tyler* offers none. And it is essentially another argument that there was one way for Ramirez to do his job if he ever wanted to rely on exigency, regardless of how circumstances changed.

### IV. What do we want officers to learn from this?

Again, the court of appeals reversed the trial court’s ruling because it thinks it unreasonable to seize a phone that could have been seized three days earlier. The message to officers is clear: take what you can as soon as you can. This Court should consider what this means for both law enforcement and citizens.

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<sup>124</sup> See *Gutierrez v. State*, 221 S.W.3d 680, 686 (Tex. Crim. App. 2007) (agreeing that police are not required to stand by and allow a person to enter a home alone when they have evidence of marijuana and stolen property inside, calling that accompaniment “a measured police response to maintain the status quo”).

To this point, the analysis has centered around the facts Ramirez believed and the conclusions he drew from them. But a reasonable officer could have come to any number of conclusions, some of which would have led to the actions espoused by the court of appeals. Maybe that is the source of confusion.

For example, based on the range of possibilities for the video(s) storage and Snapchat's settings, an officer who believed appellant was a victim/witness could have reasonably:

- Seized the coworker/victim's phone upon learning at least one video could be viewed on it, believing Snapchat was set to delete the video(s) shortly.
- Seized appellant's phone at the earliest opportunity, believing Snapchat was set to delete the video(s) shortly.
- Relied on appellant's cooperation and arranged a consensual download, believing Snapchat was set to delete the video(s) after a longer time.
- Relied on appellant's cooperation and arranged a consensual download, believing the video(s) were sent via Snapchat but were not made using the app, and therefore resided on appellant's phone.
- Sought a warrant based on probable cause that the video(s) existed in some form on appellant's phone.

Most of the options would be the same if an officer believed appellant was a suspect, with the addition that he also could have:

- Seized appellant's phone at the earliest opportunity, believing he would delete any evidence that suggested his involvement.
- Obtained an arrest warrant for appellant at the earliest opportunity, and seized his phone incident to it.
- Continued treating appellant as a cooperative suspect in an

attempt to curry favor and obtain the identity of his two armed cohorts, with the understanding that it risked the loss of the video(s).

There are probably other options, but hopefully the point is clear. A reasonable officer could have conducted this investigation any number of ways. All of these options intrude upon the property and privacy rights of people who apparently were or could have been innocent. The options that are based on probable cause that appellant was involved run the risk of obtaining evidence that will be suppressed if a court finds that his chronic laziness and coincidence are not enough. Finally, there was no way of knowing how treating appellant more overtly as a suspect could have impacted the investigation into his confederates.<sup>125</sup>

The question for this Court is whether, having all of these options, an officer must choose to seize property at the earliest conceivable opportunity or forfeit the right to rely on exigency regardless of any change in circumstances. If the evidence in this case is suppressed, will reasonable officers be deterred? Or will it serve only to encourage the maximum exercise of State power and, ultimately, to let a guilty man go free?

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<sup>125</sup> At the time of trial, they had not even been identified because the text messages at the crux of the State's case were sent or received by someone with a prepaid, or "burner," phone. 3 RR 163-64; 4 RR 75.

**PRAYER FOR RELIEF**

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction and sentence.

Respectfully submitted,

/s/ John R. Messinger

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to the WordPerfect word count tool this document contains 6,911 words.

/s/ John R. Messinger  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 23<sup>rd</sup> day of December, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

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